Supreme Court, U.S
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No. 93-1576

In The

Supreme Court of the United States

October Term, 1993

UNITED TEXAS TRANSMISSION COMPANY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS and JEFFERSON COUNTY (TEXAS) DRAINAGE DISTRICT NO. 6,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. When Congress has conditioned its approval of and appropriation of funds for a flood control project upon a requirement that the project's "local sponsor" acquire all lands and easements and make all necessary utility relocations, may the U.S. Army Corps of Engineers, invoking conditions found in pipeline permits issued pursuant to § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403), nonetheless require pipeline owners to relocate their pipelines without invoking eminent domain authority? *See Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed 2d 332 (1979).

2. When a flood control project's local sponsor fails to acquire the necessary property and make the necessary utility relocations it has undertaken to acquire and/or perform, may the Corps, in lieu of resorting to a statutory condemnation proceeding, utilize conditions found in pipeline permits issued pursuant to § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) to require pipeline owners to relocate pipelines both within and outside the geographical areas subject to such permits? *See Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed 2d 332 (1979).

3. By holding that the Corps' permit powers under § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) confer authority upon the Corps in fast lands outside the "permitted area" and the area subject to the federal navigational servitude, has the Fifth Circuit extended such powers beyond their lawful reach?

QUESTIONS PRESENTED – Continued

4. By holding that the Corps could rely upon permit conditions to demand relocations of sections of pipelines not within the permitted area in order to facilitate the construction of a flood control project having no navigational purpose, has the Fifth Circuit interpreted such conditions consistently with this Court's opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987)?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner United Texas Transmission Company ("UTTCO") presents the following Reply to the Briefs of the Federal Respondent and the Local Drainage District:

STATEMENT

In its statement of the case, Respondent Jefferson County Drainage District No. 6 (the "District") states that Congress approved the Taylors Bayou Flood Control Project for purposes of navigation, citing only to global, precatory language in the Flood Control Act of 1965 having no specific reference to this project. (District's Br. p. 4).[1] Perhaps because it is more familiar with the terms of the authorizing legislation than its local counterpart, the Federal Respondent concedes that "[t]he Taylors Bayou Project is designed to alleviate serious flooding problems in Southeastern Texas". (Federal Brief, p. 2). The Federal Respondent's brief does, nevertheless, mischaracterize UTTCO's position regarding the District's liability for the relocation costs of the project.[2]

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[1] To buttress these claims, it represents that the Corps has estimated that the "project will improve . . . navigational capability" and asserts the project will result in the widening and deepening of navigation locks on Taylors Bayou. (*Id.*) There is no evidence in the record to support these representations. In fact, the record flatly contradicts them. The Report of the Acting Chief of Engineers included as part of House Document No. 206 (89th Congress) states with reference to Taylors Bayou that "navigation of the bayou is not extensive and prospective commerce is insufficient to justify provision of a new larger lock". (App. 82). With reference to Hillebrandt Bayou – the appropriate focus of the case at bar – the same report states that "the problem is to provide sufficient capacity for the conveyance of flood runoff from the improved channel." (App. 82). In this report, the Acting Chief Engineer "recommended improvement of Taylors Bayou, Texas for *flood control and drainage*" and only on the condition that the Local Sponsor (the District) would "make all necessary alterations and relocations of structures and utilities". (App. 84). Congress approved the project *expressly* upon these recommendations. Title II (entitled "Flood Control") § 204, Flood Control Act of 1965, Pub. L. 89-298, 79 Stat. 1073 (1965).

[2] The Federal Respondent's brief states in a footnote that UTTCO has, on occasion, "acknowledged its reponsibility for bearing a portion of the relocation

REPLY TO FEDERAL RESPONDENT'S ARGUMENT

The Federal Respondent concedes that the Fifth Circuit "concluded that the Corps' revocation orders would result in a taking of [UTTCO's] property interests in pipeline located in substantial areas outside of the permitted area". (Federal Brief, p. 7, n.5).[3] However, the Federal Respondent argues that there is nothing that may be done at this point to remedy this taking because (1) any claim for monetary relief is irrelevant because UTTCO failed to file suit in the court capable of granting such relief; and (2) any viable claim for equitable relief that UTTCO had is now rendered moot by the fact that UTTCO removed the pipelines after being ordered to do so by the District Court.

UTTCO's response is two-fold: (1) the District Court was unquestionably the proper forum in which to sue the Federal and Local Defendants for unauthorized and unlawful exercise of permit powers; and (2) the fact that equitable claims UTTCO asserted may be moot is immaterial given the assertion of the claims for money damages.

The argument that UTTCO filed suit in the wrong court is based upon the notion that UTTCO should have filed suit against the United States in the Court of Federal Claims under the provisions Tucker Act. This claim is specious. The Court of Federal Claims has jurisdiction over taking claims against

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expenses." (Federal Brief, p. 4, n.3). In point of fact, UTTCO's position *with respect to the District* is and always has been that the District is responsible under the Flood Control Act of 1965 for the entire cost of relocating pipelines and other utilities. Obviously more familiar with UTTCO's claims against the District than the Federal Respondent, the District correctly notes that UTTCO responded to the relocation demands by claiming that it was entitled to "be reimbursed for the entire cost of relocation" and then "remained fast in its position". (District Brief, p. 5).

[3] The Federal Respondent describes the Fifth Circuit's conclusion as "*dicta*". The conclusion of the Fifth Circuit in this regard is anything but *dicta*. As a necessary element of one of the claims UTTCO asserted in that court, the Fifth Circuit was required to decide whether all or a substantial portion of the pipelines the Corps was demanding UTTCO to relocate (under so-called permit powers) in fact lay outside the permitted area. The Fifth Circuit concluded that substantial portions of the pipelines did in fact lay beyond the reach of both permit conditions and navigational servitude. By definition, such a conclusion did not constitute "*dicta*".

the United States *only when the taking is authorized.* The proper forum to litigate claims that officers of the United States took property *without* authorization is a federal district court. *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986) cert. denied, 479 U.S. 1053 (1979).[4]

The argument that UTTCO's claim for equitable relief against the United States is now moot is simply irrelevant. While briefly noting that this case does involve a claim for money damages[5] (Federal Brief, p. 8) the Federal Respondent neglects to explain that UTTCO has numerous claims for monetary relief against both Federal and Local Defendants (including Corps officers Joseph Trahan, John Tudela, and Brink Miller) that will be directly affected by the Fifth Circuit's opinion.[6] While not expressly addressing the merits of those claims, the Fifth Circuit's opinion will – unless set aside by this Court – necessarily preclude further assertion of the claims for monetary relief against the Corps officials because (1) the opinion concludes that the Corps had legal authorization to utilize permit powers to take UTTCO's property; and (2) UTTCO's claims against the individual defendants are predicated upon their alleged lack of authority to order UTTCO to relocate or remove its lines. Due to the

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[4] Indeed, in *Florida Rock* the Corps of Engineers took the position that a federal district court is the *only* appropriate forum for challenges to its exercise of nonexistent authority. UTTCO has consistently argued throughout this case that the Corps' use of permit powers to compel relocations that the Local Sponsor was required to make is unauthorized and unlawful. The Federal Respondent's claim that UTTCO should have gone to the Court of Federal Claims assumes that its position on the very issue in dispute is the correct one (i.e. that the Corps' permit powers provided authorization for taking UTTCO's property outsided the permitted areas). Had UTTCO filed suit in the Court of Federal Claims – as the Federal Respondent suggests – the claim could have been successfully defended on the grounds that the acting Corps officials had no authority to invoke permit conditions to relieve the Local Sponsor's financial burdens. *Florida Rock*, supra.

[5] These claims are also referenced in the District Court's opinion. (App. 42).

[6] When it granted the Federal and Local Defendants' Motions for Partial Summary Judgment, the District Court severed all pending claims for monetary relief so as to facilitate UTTCO's immediate appeal of the judgment that UTTCO was required to relocate its pipelines under permit conditions.

existence of these claims for monetary relief, the fact that the equitable claims may be moot is of no consequence. *University of Texas v. Camenisch*, 451 U.S. 390, 101 S. Ct. 1830, 68 L.Ed. 2d 175 (1981).

Turning to a discussion of the merits, the Federal Respondent – apparently unable to devise any convincing response to the arguments UTTCO has made – resorts to the tactic of mischaracterizing UTTCO's contentions into a claim that is more easily countered. The Federal Respondent attempts to contort UTTCO's argument into a claim that one is entitled to compensation before surrendering property to the government: "Petitioner contends that the Corps acted beyond its statutory authority in seeking to have petitioner relocate its pipelines without first assuring petitioner compensation for costs associated with that move". (Federal Brief, p. 8). Having changed UTTCO's argument into one it has not asserted, the Federal Respondent then attempts to address (in a footnote) the patent conflict between the Fifth Circuit's opinion and *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed 2d 332 (1979) with the platitude that "the Fifth Amendment does not require that compensation precede the taking". (Federal Brief, p. 9, n.8).

UTTCO's argument is not that the Corps lacked authority because it failed to offer compensation. To the contrary, UTTCO acknowledges that there were statutory procedures available to the Corps which could have been readily invoked without prior compensation or an assurance of such. See 33 U.S.C. §§ 593, 594. Rather, UTTCO's argument is that the Corps' "permit powers" provided no authority whatsoever for either the acquistion of UTTCO's property or the compelled relocation of UTTCO's pipelines, because (1) the obligation for relocating pipelines and acquiring easements and rights-of-way was allocated to the project's Local Sponsor; (2) permit powers may not be used as a surrogate for statutory procedures established for situations in which the Local Sponsor fails or refuses to meet its obligations. The principle that compensation need not precede the taking is immaterial to

this argument. In fact, this principle assumes and is predicated upon the existence of *authority* and the proper invocation of authority to take property. Without legal warrant for the involuntary acquisition of property, the fact that compensation is assured or not is simply beside the point.

Just as it has failed to respond to UTTCO's argument, the Federal Respondent has not addressed the conflict between *Kaiser Aetna* and the opinion of the Fifth Circuit. *Kaiser Aetna* holds that when the Goverment wishes to acquire fast lands it is required to resort to condemnation procedures, and it may not rely upon its authority under § 10 of the Rivers and Harbors Act of 1899 in lieu of such proceedings. Though acknowledging that "the scope of the Corp's authority under [the § 10 permits] to demand relocation of the pipelines at the expense of the permit holder is at the heart of this lawsuit" (App. 19), the Fifth Circuit proceeded to opine that the Corps' ability to assert this authority over fast lands was an "undeniable and undenied" proposition. (App. 39). Nowhere in its brief does the Federal Respondent even attempt to reconcile the Fifth Circuit's observation with *Kaiser Aetna*.

In an attempt to defuse the obvious conflict, the Federal Respondent instead makes the incredible suggestion that the fact that a substantial portion of the pipelines lay in fast lands outside the reach of the permit powers is a mere "contention" of UTTCO's that raises a "purely factual issue" not warranting review (Federal Brief, p. 10 and p. 11, n.10). Citing to nothing more authoritative than an unsuccessfully asserted argument from its own brief in the Fifth Circuit, the Federal Respondent further suggests that all of the sections for which relocation was required in fact lay within the streambed, not in fast lands. (Federal Brief, p. 11, n.11). That a substantial portion of the pipelines requiring relocation lay outside the streambed in fast lands is not a mere "contention" of UTTCO's. On the record before it, the Fifth Circuit explicitly found that a substantial portion of the pipelines requiring relocation rested outside the permitted area in fast lands.

(App. 35).[7] The conflict between the Fifth Circuit's resolution of this controversy and *Kaiser Aetna* is obvious.

REPLY TO LOCAL DRAINAGE DISTRICT'S ARGUMENT

While also apparently incapable of addressing the arguments UTTCO has presented to this Court, the District takes a somewhat different approach. The problem is not with UTTCO's arguments, the Court is told, but with the "insupportable" and "baseless" underlying assumptions upon which those arguments are founded. (District Brief, pp. 9-10). Implicit in this approach is a concession that if the underlying assumptions are in fact valid, the arguments upon which they are based have merit.

The first so-called "insupportable" assumption that the District identifies is that "Congress conditioned approval of an appropriation of funds for a flood control project upon a requirement that the project's local sponsor acquire all lands and easements and make all necessary utility relocations". (District Brief, p. 9). Failing to keep its story consistent with that profferred by its local partner in the project, the Federal Respondent expressly acknowledges the validity of the very proposition that the District decries as baseless. Referring to the Local Cooperation Agreement (in which the District explicitly assumed the responsibility for relocating pipelines), the Federal Respondent states:

> "Such an agreement is a statutory prerequisite to construction of a federal flood control project. Under the agreement, *the local sponsor assumes certain specified responsibilities identified in Section 3 of the Flood Control Act of 1936*, 33 U.S.C. 701c, *including responsibility for the costs of any necessary relocations of facilities.*"

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[7] In the process of so deciding, the Fifth Circuit flatly rejected the very argument the Federal Respondent now attempts to revive from its own brief in that court. (App. 30-31). UTTCO agrees with the observation that this issue does not warrant revisitation. As the Fifth Circuit held, this case does involve the compelled relocation of substantial portions of pipeline lying in fast lands.

(Federal Brief, p. 2, n.2, emphasis added). Indeed, the requirement that the Local Sponsor "make all necessary alterations and relocations of structures and utilities" is explicitly stated in the Acting Chief Engineers' report (App. 84), and Congress specifically relied upon these recommendations and incorporated them into its approval of the project. Title II (entitled "Flood Control") § 204, Flood Control Act of 1965, Pub. L. 89-298, 79 Stat. 1073 (1965). If Congress did not impose this potentially massive obligation upon the District, then why would the District have expressly undertaken to relocate utilities in the Local Cooperation Agreement and why would it have subsequently agreed to indemnify the Corps for damages assessed because of the invocation of permit powers against pipeline owners? Further, as the Fifth Circuit acknowledged, the sections of pipeline placed in fast lands were placed there under "easements and rights-of-way" (App. p. 43), which property interests were taken pursuant to the Corps' exercise of permit power. The District cannot deny its obligation to acquire and pay for such property rights. 33 U.S.C. § 701c.

The second proposition with which the District takes issue is that it "failed to acquire the necessary property and make the necessary utility relocations it had undertaken to acquire or perform". The evidence is uncontroverted that the District either failed or refused to make the only pipeline relocations at issue in this case (i.e UTTCO's two pipelines), and that it failed or refused to acquire the easements and rights-of-way in the fast lands in which these pipelines were situated.[8] The fact that it entered into a Local

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[8] The project was approved in 1965. Work commenced in 1982. Contrary to the Districts' representations, the Corps did *not* initiate contact with UTTCO regarding its pipelines "when work began" (i.e. in August, 1982). (District's Brief, p. 4). As noted in the District Court's opinion, the Corps initiated contact with UTTCO in May, 1986 (almost four years after work had begun), and the District, the Corps, and UTTCO continued to argue over who was responsible for making the relocations for "approximately two years". (App. 42-44). It was during the period of time between the commencement of work in 1982 and early 1989 (when the permits were intitially suspended) that the District, claiming it was financially strapped, engaged in protracted behind-the-scenes lobbying in an effort to persuade the Corps to use its permit powers against pipeline owners. Obviously, the District both failed and refused to make the necessary relocations. If it had fullfilled its obligations, this dispute would have never arisen.

Cooperation Agreement did not – as the District seems to suggest – satisfy all of its obligations under the statute authorizing the project (District Brief, p. 10) for the simple reason that the District then proceeded not to perform its contractual obligations.

The District also disputes the proposition that the Fifth Circuit "held that the Corps' permit powers conferred authority upon the Corps in fastlands outside the 'permitted area' and the area subject to the federal navigational servitude." The Fifth Circuit stated that the Corps' permit powers were "at the heart of this lawsuit". (App. 19). In the course of its opinion, it discussed no authority for the Corps' actions other than permit powers and federal navigational servitude. It would have been pointless for the Fifth Circuit to discuss any other source of federal authority (such as eminent domain) because no other such authority was ever invoked by the Federal Respondent. The Fifth Circuit then held that "the Corps has the absolute authority to order relocations in the fastlands too", describing this notion as an "undeniable (and undenied) proposition". (App. 39). Since no legal authority other than permit powers and federal navigational servitude was addressed or was even at issue in the case, the Fifth Circuit's holding regarding the Corps' alleged "absolute authority" could only have pertained to either the Corps' permit powers or the navigational servitude.[9]

The last of the four so-called "baseless" and "unsupportable" assumptions with which the District takes issue is that the project has "no navigational purpose". The very case the District cites with reference to this argument indicates that, in determining the purpose of such a project, the Court considers not a general statement of purpose appearing in the legislation but the relevant House Document. *United States v. Twin City Power Co.*, 350 U.S. 222, 75 S.Ct. 259, 100 L.Ed. 240 (1956); *see also United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950) (stating that the Court has never been guided by such general statements of legislative purpose). The relevant portions of

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[9] Furthermore, the Fifth Circuit did not – as the District flatly misrepresents – find that the required relocations in fast lands were "incidental". (District Brief, p. 13). In fact, the Fifth Circuit rejected this very argument and specifically stated that these relocations were *not* "incidental" but "substantial" in nature. (App. 35).

House Document No. 206 belie the existence of any navigational purpose to the work on Hillebrandt Bayou. (App. 79-88). Futhermore, the specific legislation pertaining to the Taylors Bayou Project clearly identifies it as a project for flood protection.[10] The Federal Respondent acknowledges that the purpose of the project was flood control, and that the project was treated as one for flood control in imposing the requirement of local cooperation. (Federal Brief, p. 2 and p. 2, n.2).

Although it takes issue with what it calls "assumptions" underlying UTTCO's arguments, the District offers almost nothing to counter the arguments themselves. It attempts to address the conflict between *Kaiser Aetna* and the Fifth Circuit's opinion with one conclusory statement denying the existence of a conflict. (District Brief, p. 12). No analysis or discussion accompanies this statement.

With regard to the question of whether the Corps' actions were consistent with the expressed intent of Congress in authorizing the project, the District merely states that "it was not necessary for the court of appeals [and hence this Court] to consider the intent of Congress in passing the Flood Control Act of 1965" due to the revocation of the permits. (District Brief, p. 8). Because Congress did not intend for the Corps to use permit powers, the question whether the permits would have been properly revoked if such authorization were present (the issue the Fifth Circuit chose to address) is the irrelevant issue in this case. Both the District's argument and the Fifth Circuit's opinion are predicated upon an assumption that the Corps' use of permit powers was authorized by and consistent with the statutory requirement that the Local Sponsor should make the required relocations and obtain the necessary

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[10] **Title II (entitled "FLOOD CONTROL") § 204 of the Flood Control Act of 1965, Pub. L. 89-298, 79 Stat. 1073 (Oct. 27, 1965),** provides with reference to the Taylors Bayou project, that:

> The project for flood protection on Taylors Bayou, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers, as modified by the Secretary of the Army, in House Document Numbered 206, Eighty Ninth Congress, of an estimated cost of $5,004,000.

property for the project. If there are any "baseless" or "unsupportable" assumptions underlying the arguments presently before this Court, this is surely one of them. There is no basis for the use of permit powers to accomplish acquisition of property and relocation of pipelines in a manner contrary to the express will of Congress in approving a local protection project.

In its discussion of *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987), the District argues that "UTTCO had no . . . property interest" taken for public use. In so arguing, it ignores the conclusion by the Fifth Circuit – acknowledged by the Federal Respondent – that "the Corps' revocation orders would result in a taking of [UTTCO's] property interests in pipeline located in substantial areas outside of the permitted area". (Federal Brief, p. 7, n.5). It is simply ludicrous to suggest that UTTCO's rights in fast lands do not represent valuable property rights protected against uncompensated taking. As this Court has observed, none of its decisions "have ever doubted that when the Government wished to acquire fast lands, it was required by the Eminent Domain Clause of the Fifth Amendment to *condemn* and pay fair value for that interest." *Kaiser Aetna*, 444 U.S. 164, 177, 100 S.Ct. 383, 391 (emphasis added). With respect to UTTCO's rights in fast lands, the Fifth Circuit properly observed that UTTCO's rights were the same as "any farmer whose property is burdened by UTTCO's easement and lies in the way of the widening project" and that these rights constitute "private property". (App. 31-2). Just as the Corps has no right to take farm land by resort to its "permit powers", it had no right to take UTTCO's property. It was required to condemn such property. *Id.*

CONCLUSION

United Texas Transmission Co. respectfully requests that its Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully Submitted,

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